Supreme Court, U.S.
FILED
OCT 30 2008
OFFICE OF THE CLERK

No. 08- 08-585

IN THE
Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

DAVID E. WADE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
OHIO COURT OF APPEALS, TENTH APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the doctrine of collateral estoppel recognized in *Ashe v. Swenson*, 397 U.S. 436 (1970), bar or limit the trier of fact in a second trial from considering evidence that is relevant to the remaining charges?

2. Does an acquittal on issues of whether a gun was "deadly" or "operable" create a collateral estoppel bar to the consideration of evidence indicating that the defendant wielded the gun, when the gun need not be "deadly" or "operable" to be relevant to the retried counts?

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OPINIONS BELOW

After respondent was convicted in a second trial, the Ohio Court of Appeals, Tenth Appellate District, rendered an opinion and judgment on February 12, 2008, reversing all convictions and remanding for further proceedings. *State v. Wade*, 2008 Ohio 543, 2008 Ohio App. Lexis 459 (2008). The opinion is set forth in Appendix B.

On April 15, 2008, the Tenth District partially granted the prosecution's motion for reconsideration and reinstated most of respondent's convictions but adhered to its decision to reverse and remand the counts of rape and aggravated burglary. *State v. Wade*, 2008 Ohio 1797, 2008 Ohio App. Lexis 1541 (2008). The decision is set forth in Appendix A.

The prosecution's timely appeal of the February 12th opinion was docketed in the Ohio Supreme Court as Case No. 08-604. The prosecution's timely appeal of the April 15th decision was docketed in the Ohio Supreme Court as Case No. 08-941. On August 6, 2008, the Ohio Supreme Court declined discretionary review over both appeals. The entries declining review are set forth in Appendix C and Appendix D.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari was timely filed within ninety days of the Ohio Supreme Court's entries declining discretionary review on August 6, 2008. Section 1257(a) of Title 28 of the United States Code confers jurisdiction on this Court to address whether the Ohio Court of Appeals properly applied federal collateral-estoppel doctrine under *Ashe v. Swenson*, 397 U.S. 436 (1970).

Even though the Ohio Court of Appeals has remanded for further proceedings on the rape and aggravated burglary charges, the judgment of the Ohio Court of Appeals is a "final judgment" within the meaning of Section 1257(a). *Florida v. Meyers*, 466 U.S. 380, 381 (1984); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975); *see also*, *Kansas v. Marsh*, 548 U.S. 163, 168 (2006) (citing *Meyers* and cases of "like circumstances" as allowing certiorari review of prosecution petition before retrial).

The prosecution will not be able to obtain review of the federal issue in Ohio courts after a retrial. *State v. D'Ambrosio*, 73 Ohio St.3d 141, 143, 652 N.E.2d 710, 713 (1995) (*res judicata*); *Nolan v. Nolan*, 11 Ohio St.3d 1, 4, 462 N.E.2d 410, 413 (1984) (law-of-the-case doctrine). In addition, if the prosecution wins the retrial, the federal issue will be mooted; if the prosecution loses, the prosecution will be unable to appeal the acquittal. Ohio Revised Code, § 2945.67(A) (prosecutor cannot appeal "final verdict"); *State ex rel. Yates v. Court of Appeals*, 32 Ohio St.3d 30, 512 N.E.2d 343 (1987).

CONSTITUTIONAL PROVISIONS INVOLVED

In pertinent part, the Fifth Amendment provides, as follows:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

The Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment, which provides, as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE

On August 20, 2002, victim C.B. had returned to her apartment for lunch when respondent Wade knocked on the door. Respondent asked if a particular guy lived there and then asked to use the phone. C.B. unlocked the dead-bolt lock and handed her phone outside. She again locked the door. When respondent said he was done, she unlocked the door. Respondent then pushed his way inside C.B.'s apartment.

Respondent shut the door behind him, pulled a large silver revolver from a backpack, and told C.B. to back up. He said he had been watching her. C.B. began to scream. Holding her at gunpoint, respondent told C.B. to be quiet, and he told her to take off her clothes. After she removed her shirt and pants, respondent told C.B.

to take off her bra and panties. Respondent forced her to lie on the floor, and he forced vaginal intercourse. He held the gun as he completed the act, and said, "shut up, you'll like it."

After the rape, respondent allowed C.B. to put on her shirt. Respondent then asked if she had any money in her purse, and he took a dollar and some change. He then saw her laptop computer and told C.B. to put it in her book bag. She asked to keep her textbooks. Respondent took C.B.'s phone, the cords to the laptop, its charger, her purse and contents, and the key to her car. As he ran out the door, he told her that she had better not leave. Respondent later threw the purse in a dumpster.

A neighbor verified that respondent was outside C.B.'s apartment at about the time of the crime. Later that same night, respondent offered to sell the phone for drugs to another crack user. Respondent then pulled a large silver revolver on him.

On September 2, 2002, respondent was driving C.B.'s car when a police officer attempted to stop him. Respondent fled at a high speed, crashed into another car, and was caught after a foot chase. He initially denied knowing "the girl" or anything about the crime.

The victim C.B., a neighbor, and the crack user picked respondent's picture out of photo arrays. DNA taken from respondent matched that found on the vaginal swab of the victim.

Respondent later testified that the sex was consensual. He admitted stealing C.B.'s car, laptop, and cell phone, when C.B. was in the shower. He acknowledged that this was a "bad decision," given that he was on probation for breaking and entering. He admitted that he sold the cell phone to the crack user but denied robbing him. Respondent admitted that he lied to the police upon arrest and at the police station.

In a nine-count indictment, respondent was charged with aggravated burglary, rape, kidnapping, aggravated robbery, theft (two counts: motor vehicle, and purse and contents, including credit cards), receiving stolen property (motor vehicle), failure to comply with an order or signal of a police officer, and possession of drugs. The first six of these counts included firearm specifications for possessing a "firearm" and brandishing, displaying, or using it.

As the first jury was instructed, an essential element of aggravated robbery was having a "deadly weapon" and brandishing, displaying, or using that weapon. (1st Trial Tr. 540-41) The first jury was instructed (*Id.* 536) that a "deadly weapon" is "any instrument, device, or thing capable of inflicting death and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." Ohio Revised Code § 2923.11(A).

As the first jury was also instructed, an essential element of the firearm specifications was that a "firearm" was involved. (1st Trial Tr. 536-37) A "firearm" is "any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive

or combustible propellant." Ohio Revised Code, § 2923.11(B)(1). The jury was instructed that "firearm" includes "an unloaded firearm, and any firearm which is inoperable but which can readily be rendered operable." *Id.*

The first trial jury found respondent guilty of all counts except aggravated robbery. The jury also acquitted respondent of the firearm specifications. The Ohio Court of Appeals later reversed and remanded based on trial error in violating respondent's right to be present when certain jury questions were answered. *State v. Wade*, 2004 Ohio 3974, 2004 Ohio App. Lexis 3593 (2004).

Before the retrial, the defense filed motions based on collateral estoppel to preclude the prosecution from introducing evidence of the gun. The motions were extensively argued. (See 5-8-06 Tr. 4-30) The prosecution's position was cogently summarized in a supplemental memorandum filed on March 27, 2006:

> The State reiterates that the Courts at all levels have rejected Defendant's claim that the acquittal operates to bar the admission of evidence in a subsequent trial. See U.S. Supreme Court decision *Dowling v. U.S.* (1990), 493 U.S. 342, * * *.
>
> The State stresses that in addition to the arguments already made, collateral estoppel simply does not apply. Acquittal on the gun specifications, for example, could reflect nothing more than the jury was unconvinced

> of operability, but operability is entirely unnecessary to prove a rape offense. What matters for rape is the Defendant made the victim believe that he had a weapon, not that the weapon actually worked. * * * These related scenarios are why collateral estoppel requires a careful and searching examination of the first trial, and why the Court in *Dowling*, supra, and subsequent Courts have stressed that the burden is on the Defendant to show that a particular issue has been fully litigated by the first trial. The State submits that the Defendant has not done and can not do that in this case.

The trial court allowed the admission of the gun evidence. (5-8-06 Tr. 28)

On retrial, neither the previously-acquitted aggravated robbery count nor the firearm specifications were submitted to the jury. A part of the aggravated burglary count dependent on the possession of a deadly weapon was not submitted to the jury, and the prosecution proceeded on the theory of aggravated burglary that respondent inflicted or threatened physical harm during the burglary.

Respondent requested a jury instruction that would state "you cannot find he used a deadly weapon to facilitate the rape." (2nd Trial Tr. 658) The request was denied, and the second jury convicted on all of the offenses submitted to it.

Upon further appeal, respondent argued that because the first jury acquitted on the firearm specifications and the aggravated robbery count, collateral estoppel barred any testimony regarding respondent's use or possession of a gun and that, at a minimum, an instruction should have been given preventing the jury from considering whether the gun was used to facilitate the rape. (Defense Brief, First and Second Assignments of Error, at pp. 5-15)

The prosecution filed briefing that opposed those contentions on various grounds. The prosecution argued, inter alia, that operability may have been a possible determinant in the acquittals and that respondent had not met his burden of proving that the issue he sought to foreclose had been decided in his favor. (Prosecution Brief, at p. 12) The prosecution also contended that "testimony relating to prior acquitted conduct does not violate the Double Jeopardy Clause or collateral estoppel principles." (*Id.* at p. 8; *see also*, id. at pp. 7, 8, 15-17, citing and/or quoting *Dowling v. United States*, 493 U.S. 342 (1990))

The Ohio Court of Appeals reversed. *State v. Wade*, 2008 Ohio 543, 2008 Ohio App. Lexis 459 (2008). The court found that collateral estoppel did not bar the testimony in the second trial that the respondent possessed a gun during the offenses of August 20, 2002. *Id.* at ¶¶ 20, 21. Nevertheless, the court went on to hold that the "principle" underlying collateral estoppel required a jury instruction that the gun could form no part of the evidence of force or threat of force needed to accomplish the rape. *Id.* at ¶ 24. The court remanded all the counts for retrial, not just the rape count.

On April 15, 2008, the court partially granted the prosecution's application for reconsideration. *State v. Wade*, 2008 Ohio 1797, 2008 Ohio App. Lexis 1541 (2008). The court agreed that six of the eight convictions were not implicated by the limiting-instruction error. *Id.* at ¶¶ 5-7, 12. However, using a plain-error analysis, the court concluded that the limiting instruction requested for rape also should have been given for aggravated burglary. The court therefore adhered to its decision to reverse and remand the aggravated burglary count as well as the rape count. *Id.* at ¶¶ 8-12.

The prosecution sought discretionary review in two appeals to the Ohio Supreme Court. In the memoranda supporting the appeals, the prosecution's chief proposition of law contended that, "Because collateral estoppel does not limit or preclude the admission of evidence in a subsequent criminal trial, a limiting instruction based thereon should not be given." The prosecution cited statements in various cases from this Court in support of its position, including *Dowling* and *United States v. Felix*, 503 U.S. 378 (1992). *See* Memo Supp. Jurisdiction, No. 08-604, at pp. 6-13; Memo Supp. Jurisdiction, No. 08-941, at pp. 6-15.

The prosecution also contended at pages 12 to 13 of its memoranda:

> To establish the compulsion by force or threat necessary for rape, the State was not required to prove that the weapon was an operable "firearm" or that the weapon was "deadly." It

> was enough that appellee compelled the victim to submit by causing the victim to perceive a danger. The weapon very well could have been a papier mache, non-deadly, and non-operable item, but appellee's actions, including the wielding of the item appearing to be a handgun, were sufficient to show compulsion through force or threat of force.

As the prosecution concluded at pages 13 and 15 of its respective memoranda:

> At bottom, the Tenth District's fundamental error was to misapply the collateral estoppel doctrine to the admission of evidence and to misunderstand the reach of the first jury's earlier acquittals.

On August 6, 2008, the Ohio Supreme Court declined review in both appeals on a 5-2 vote.

ARGUMENT

I. COLLATERAL ESTOPPEL DOES NOT BAR OR LIMIT THE ADMISSION OF EVIDENCE IN A SECOND TRIAL.

II. A CRIMINAL DEFENDANT BEARS THE BURDEN OF PROVING THAT THE ISSUE OF ULTIMATE FACT HE SEEKS TO FORECLOSE WAS ACTUALLY AND NECESSARILY DECIDED IN HIS FAVOR IN THE EARLIER ACQUITTAL.

The issues presented herein warrant certiorari review. In regard to the first question presented, the Ohio court's expansion of collateral estoppel to bar or limit the consideration of evidence conflicts with the logic of this Court's decision in *Dowling* and conflicts with post-*Dowling* case law in some of the federal circuits and some state courts. Since collateral estoppel did not bar the retrial of rape and aggravated burglary, the collateral-estoppel doctrine was thereby exhausted as to those counts, and the Ohio Court of Appeals should not have extended it to limit the consideration of evidence.

The second question presented also warrants certiorari review. The Ohio court's decision conflicts with the proper analysis of collateral estoppel approved by this Court. The Ohio Court of Appeals incorrectly determined that the first jury's acquittal on aggravated robbery and all firearm specifications somehow meant that respondent did not have a weapon at all, when the acquittal meant, at most, that there was a doubt about whether respondent had an "operable" or "deadly" weapon.

The second question presented is also fairly related to the first question. Even if this Court were to conclude that collateral estoppel could warrant a limiting instruction, the particular circumstances of the case would need to be analyzed to determine the proper scope of the limiting instruction. The convictions for rape and aggravated burglary could have been affirmed under harmless-error and/or plain-error review if the limiting-instruction error had only involved the failure to preclude the jury from considering whether an "operable" or "deadly" gun was used to facilitate the crimes. It was no defense to rape and aggravated burglary that respondent may have intimidated the victim with only an inoperable or non-deadly gun.

A.

Collateral estoppel applies to the states as an "ingredient" of double jeopardy analysis pursuant to *Ashe v. Swenson*, 397 U.S. 436, 445 n.10 (1970). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. The collateral estoppel bar will not apply "unless the record establishes that the issue was *actually* and *necessarily* decided *in the defendant's favor*." *Schiro v. Farley*, 510 U.S. 222, 236 (1994) (emphasis added). "[T]he burden [is] on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling*, 493 U.S. at 350.

B.

The Ohio Court of Appeals misapplied collateral-estoppel doctrine to conclude that a "principle" of that doctrine limited the use of evidence in a second trial. Although the appellate court nominally allowed the admission of evidence that defendant had wielded a gun during the rape and aggravated burglary, the appellate court ruled that an earlier acquittal of firearm specifications and of aggravated robbery precluded the prosecution from using the gun evidence to prove that respondent had used force or the threat of force for purposes of rape or to prove that respondent had inflicted or threatened physical harm for purposes of aggravated burglary.

This result conflicts with this Court's statements on the issue of whether collateral estoppel bars the admission of evidence. In *Dowling*, the defendant was tried and acquitted on burglary and attempted robbery. Despite the acquittal, evidence of those crimes was introduced in the trial of a second robbery case. This Court concluded that collateral estoppel did not bar use of the *evidence* of the first robbery in the second robbery case because the first robbery was not an issue that needed to be proven beyond a reasonable doubt in the second trial; the evidence was admissible under the far lower burden of persuasion governing the admissibility of evidence. *Id.* at 348. This Court therefore rejected the defendant's reliance on *Ashe*:

> [W]e decline to extend *Ashe v. Swenson* and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all

> circumstances * * * relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.

493 U.S. at 348. Just two years later, this Court explained *Dowling*:

> Underlying our approval of the [acquitted conduct] evidence in *Dowling* is an endorsement of the basic, yet important, principle that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct.

United States v. Felix, 503 U.S. 378, 387 (1992).

Before *Dowling* and *Felix*, lower courts were split on the issue of whether collateral estoppel had an evidence-barring or evidence-limiting effect. This split is summarized in a law review article published in 1989:

> The Court has not, however, recently addressed the use of collateral estoppel on which this article focuses — the use of the doctrine to restrict the prosecution's evidence or theory. The majority of the federal courts and some state courts permit this use.[1] Many

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1. *See, e.g., United States v. Gornto*, 792 F.2d 1028 (11th Cir. 1986); *United States v. Johnson*, 697

(Cont'd)

courts, however, have held that the doctrine is limited to those cases in which an ultimate fact has been resolved in the defendant's favor in a prior proceeding,[2] and the Supreme Court may ultimately agree. In *Yates v. United States*, [354 U.S. 298, 338 (1957)], over a decade before its decision in *Ashe*, the Court stated: "The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding. So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative." If the Court

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(Cont'd)

F.2d 735 (6th Cir. 1983), *cert. denied sub nom. Hicks v. United States*, 108 S. Ct. 95 (1987); *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979); *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1978); *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972); *Riley v. State*, 181 Ga. App. 667, 353 S.E.2d 598 (1987); *see also United States v. Keller*, 624 F.2d 1154 (3d Cir. 1980) (discussing the question and restating that circuit's position that the evidence is barred by non-constitutional doctrine of collateral estoppel which prohibits relitigation of decided facts); * * *.

2. *See, e.g., Flittie v. Solem*, 775 F.2d 933 (8th Cir. 1985), *cert. denied*, 475 U.S. 1025 (1986); *United States v. Sutton*, 732 F.2d 1483 (10th Cir. 1984); *United States v. Van Cleave*, 599 F.2d 954 (10th Cir. 1979); *see also People v. Goodman*, 69 N.Y.2d 32, 36-44, 503 N.E.2d 996, 999-1003, 511 N.Y.S.2d 565, 568-72 (1986) (declining to adopt the "evidentiary fact rule" in that case) * * *.

> limits the doctrine in this manner, the doctrine will never act to bar evidence. * * *

Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. Cin. L. Rev. 1, 8 (1989) (some footnotes omitted; remaining footnotes renumbered and partly quoted in footnotes one and two here).

After *Dowling* and *Felix*, the Fifth Circuit recognized that *Dowling* "calls into question the line of cases holding that collateral estoppel may bar the admission or argumentation of facts necessarily decided in the first trial, even if the subsequent prosecution is not completely barred." *United States v. Brackett*, 113 F.3d 1396, 1401 n. 9 (5th Cir. 1997).

> A general verdict of acquittal "necessarily determines" only that the evidence was insufficient to prove each *element* of the offense beyond a reasonable doubt; therefore, collateral estoppel bars relitigation only of facts that must be proven beyond a reasonable doubt.
>
> Because only ultimate facts must be established beyond a reasonable doubt, however, *Dowling* effectively limits the doctrine of collateral estoppel to cases in which the government seeks to relitigate an essential element of the offense. *See Dowling*, 493 U.S. at 348 (declining to give collateral estoppel effect to a prior acquittal that did not decide an ultimate issue in the second

> prosecution); *see also Ashe*, 397 U.S. at 443 (limiting collateral estoppel to ultimate facts). "*Dowling* teaches that the *Ashe* holding only bars relitigation of a previously rejected factual allegation where that fact is an ultimate issue in the subsequent case." *Wright v. Whitley*, 11 F.3d 542, 546 (5th Cir. 1994); *accord Nichols v. Scott*, 69 F.3d 1255, 1271-72 (5th Cir. 1995), *cert. denied*, 135 L. Ed. 2d 1076, 116 S. Ct. 2559 (1996).
>
> Given the narrow interpretation of collateral estoppel endorsed in *Dowling*, it is difficult to conceive of a case in which collateral estoppel would bar the admission or argumentation of facts necessarily decided in the first trial, without completely barring the subsequent prosecution. In the instant case, however, we have no occasion to consider whether *Dowling* has overruled this line of decisions, and we leave that question for another day.

Brackett, 113 F.3d at 1401 n. 9 (emphasis in *Brackett*).

After *Dowling*, other courts have indicated or held that there is no evidence-barring or evidence-limiting effect. *United States v. Yearwood*, 518 F.3d 220, 228-29 (4th Cir. 2008); *United States v. Bailin*, 977 F.2d 270, 277 n. 9 (7th Cir. 1992) ("We note that *Mespoulede*, insofar as it held that issue preclusion applies to evidentiary as well as ultimate facts, has been partially overruled by *Dowling* * * *."); *Santamaria v. Horsley*, 138 F.3d 1280 (9th Cir. 1998) (use of knife not issue of ultimate fact in

retrial; evidence of stabbing not barred); *United States v. Gil*, 142 F.3d 1398, 1401 (11th Cir. 1998) (if previously-determined fact not ultimate issue in mistried count, prosecution can introduce evidence related to acquitted count in retrial of mistried count); *Halicki v. United States*, 614 A.2d 499, 505 (D.C. App. 1992) (*Dowling* rejected view that evidence relating to acquitted conduct is inadmissible in future trial); *Commonwealth v. Woods*, 414 Mass. 343, 353-54, 607 N.E.2d 1024, 1031-32 (1993) (collateral estoppel "applies to factual issues, not evidence."); *State v. Eggleston*, 164 Wn.2d 61, 71-75, 2008 Wash. Lexis 616 (2008) (issue of defendant's knowledge of victim as police officer was not issue of ultimate fact in subsequent trial; no bar to introduction of evidence of such knowledge); *Eatherton v. State*, 810 P.2d 93, 99 (Wyo. 1991) ("we decline * * * to adopt the evidentiary facts application of the doctrine of collateral estoppel.").

However, some courts deciding the issue after *Dowling* and *Felix* have gone in the opposite direction. *Rossetti v. Curran*, 891 F. Supp. 36 (D. Mass. 1995); *State v. Aparo*, 223 Conn. 384, 409, 614 A.2d 401, 413 (1992) ("evidence of crimes of which the defendant has previously been acquitted, and concerning which the prior jury demonstrably harbored a reasonable doubt, should be excluded when it 'would establish an element of the charged offense and could therefore form the basis of the conviction * * *.'").

In the present case, the Ohio Court of Appeals incorrectly stated that collateral estoppel can bar or limit the admission of evidence. 2-12-08 Opinion, at ¶ 12. The court also cited the district court decision in *Rossetti*, see 2-12-08 Opinion, at ¶ 24, even though the First

Circuit upon review in *Rossetti* had concluded that the district court's attempted distinction of *Dowling* was "very doubtful." *Rossetti v. Curran*, 80 F.3d 1, 5-6 (1st Cir. 1996).

C.

Ohio submits that, although collateral estoppel may bar successive litigation on counts, or elements of offenses, collateral estoppel has no evidence-barring or evidence-limiting effect. The holding of *Ashe* is that only the relitigation of issues of "ultimate fact" are barred, not issues of evidentiary fact. In light of this Court's earlier statement in *Yates* that collateral-estoppel doctrine usually does not apply to the proof of mere evidentiary facts, *Ashe*'s exclusive focus on "ultimate facts" must be taken as intentional.

This Court has consistently equated "ultimate facts" with verdicts. This Court has observed that:

> It is often necessary for the trier of fact to determine the existence of an element of the crime — that is, an "ultimate" or "elemental" fact — from the existence of one or more "evidentiary" or "basic" facts. *** [I]n criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.

County Court v. Allen, 442 U.S. 140, 156 (1979) (constitutionality of mandatory presumptions). The

Court noted the rational connection between basic facts proven at trial and the ultimate fact which an evidentiary presumption permits the jury to find. *Id.* at 165.

The same year, the Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), considered that a part of the responsibility of the trier of fact in reaching a verdict is "to draw reasonable inferences from basic facts to ultimate facts." This Court has equated the factfinder's responsibility to find the "ultimate facts beyond a reasonable doubt" to the right to have the jury (rather than the judge) reach a guilty verdict. *United States v. Gaudin*, 515 U.S. 506, 514-15 (1995) (citations omitted).

D.

Dowling and *Felix* confirm that the introduction of mere evidence does not trigger collateral-estoppel protections. The admission of evidence is governed by a lower standard of proof, *see Dowling*, and the admission of evidence is not the same as a "prosecution" for such evidence. *See Felix.*

The defense counterargument is that collateral estoppel must be applicable to proof of mere evidentiary facts. Otherwise, the second factfinder may find the defendant guilty of an "ultimate fact" beyond a reasonable doubt in the second trial based in whole or in substantial part on evidence of acts for which a reasonable doubt existed for the first jury.

The present case does not involve a scenario in which the prosecution was required to rely exclusively on "gun" evidence in order to have respondent be found guilty of

using or threatening force or of inflicting or threatening physical harm. Respondent's actions of forcing his way into the victim's apartment and his issuance of various commands to the victim (e.g., "shut up, you'll like it") were enough to show that respondent was at least threatening force and physical harm. Respondent could be convicted under Ohio law without any use of a "gun" in his actions/threats toward the victim. Even if the prosecution was relying exclusively on respondent's actions in wielding a "gun," the "gun" fact was still merely evidentiary in the second trial and not an issue that the jury was required to find beyond a reasonable doubt.

E.

Even if collateral estoppel could bar or limit the consideration of mere evidence, respondent failed to show that the first jury decided the issue in such a way that respondent's use of a "gun" should be barred from consideration regarding rape and aggravated burglary. The collateral estoppel bar will not apply "unless the record establishes that the issue was *actually* and *necessarily* decided *in the defendant's favor.*" *Schiro*, 510 U.S. at 236.

The prosecution contended that the first jury's acquittals at most could be understood to mean that there was a reasonable doubt about whether the gun was operable. This made sense, since respondent did not fire the gun, the gun was not produced at trial, and the victim testified in the first trial that she was "not that familiar with guns." (1st Trial Tr. 131) Thus, the first jury could have merely harbored a reasonable doubt about operability.

Equally so, a "deadly weapon" was required for aggravated robbery, and the first jury's acquittal merely could have reflected a doubt about the deadly nature of the weapon. While Ohio law allows a jury to infer that even an inoperable gun is a "deadly weapon," see *State v. Vondenberg*, 61 Ohio St.2d 285, 401 N.E.2d 437 (1980), such an inference would have been permissive. If the first jury harbored a doubt about whether the weapon was "deadly," the jury was required to acquit of aggravated robbery.

The Ohio Court of Appeals dismissed the prosecution's arguments by contending that it must avoid a "hypertechnical and archaic approach" to the issue. But the jury instructions for the first jury defined both "deadly weapon" and "firearm" as essential elements of the aggravated robbery count and/or the firearm specifications. *Ashe* itself mandates that the jury charge must be considered in determining whether "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose." *Ashe*, 397 U.S. at 444. In the absence of evidence that respondent actually fired the weapon or that the weapon was recovered and tested, the first jury rationally could have concluded that the respondent in fact had possessed a gun but that there was a doubt about the "deadly" and "operable" nature of that gun.

As the Ohio Court of Appeals acknowledged, the first jury asked a question about whether a deadly weapon was required to find respondent guilty of aggravated robbery, and the trial court replied in the affirmative. 2-12-08 Opinion, at ¶ 18. But the Court of Appeals then counterintuitively concluded that the

acquittal did not depend on the "deadly" or "operable" nature of the weapon. Given the jury's specific question about "deadly weapon" and the court's affirmative reply, and given the jury instructions, it is hardly "hypertechnical" and "archaic" for the prosecution to contend that the first jury may have merely doubted the "deadly" and "operable" nature of the weapon.

While the operable and deadly nature of the weapon was an issue for aggravated robbery and for the firearm specifications, the operable/deadly nature of the weapon was unimportant to the rape and aggravated burglary charges as submitted to the second jury. The prosecution was not required to prove that the weapon was an operable "firearm" or that the weapon was "deadly" in the second trial. "[T]he State could prove these offenses without proving that appellant used a gun." 2-12-08 Opinion, at ¶ 19. It was enough that respondent threatened the victim by creating a *perceived* danger. Since the "operable" and "deadly" nature of the gun was a mere evidentiary fact in the second trial, the second jury could conclude by a preponderance that the gun in fact was operable and deadly. But, even if the second jury was not inclined to reach that conclusion, the second jury could still consider the "gun" evidence for its effect in intimidating the victim. In either event, the defense was unentitled to a limiting instruction that barred the second jury from considering the "gun" evidence.

The issue becomes a matter of semantics. Respondent's trial counsel requested an instruction that that would have prevented the jury from considering whether the "deadly weapon" was used to facilitate the

rape. But this requested instruction went too far, since such an instruction would have made it appear that the jury could not consider the "gun" evidence at all and since the operable and deadly nature of the "firearm" *could* be considered under the preponderance burden applicable to the consideration of evidentiary facts.

The Ohio Court of Appeals concluded that "the jury in the first trial necessarily found that appellant did not possess a gun during the offenses." 2-12-08 Opinion, at ¶ 25. The court contended that the trial court should have instructed the jury that "it could not consider the gun testimony in determining whether appellant used force while committing the rape offense." *Id.* This broad limitation on the "gun" evidence was improper, as the second jury at the very least could properly consider the "gun" evidence under the theory that respondent intimidated the victim with a non-deadly and inoperable "gun."

CONCLUSION

In light of the foregoing, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A — DECISION OF THE COURT OF APPEALS OF OHIO, FOR THE TENTH APPELLATE DISTRICT FILED APRIL 15, 2008

THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT

No. 06AP-644
(C.P.C. No. 02CR09-5493)

(REGULAR CALENDAR)

State of Ohio,

Plaintiff-Appellee,

v.

David E. Wade,

Defendant-Appellant.

DECISION

Rendered on April 15, 2008

ON APPLICATION FOR RECONSIDERATION

KLATT, J.

Plaintiff-appellee, the State of Ohio, has filed an application for reconsideration, pursuant to App.R. 26(A), requesting that the court reconsider our decision

rendered on February 12, 2008. Defendant-appellant, David E. Wade, filed a memorandum in opposition. For the following reasons, we grant the State's application.

When presented with an application for reconsideration, an appellate court must determine whether the application calls to the court's attention an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. *State v. Rowe* (Feb. 10, 1994), Franklin App. No. 93AP-1763; *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 69. "An application for reconsideration may not be filed simply on the basis that a party disagrees with the logic used by the appellate court or the conclusions it reached." *Juhasz v. Costanzo* (Feb. 7, 2002), Mahoning App. No. 99-CA-294. "App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *State v. Owens* (1996), 112 Ohio App.3d 334, 336.

In this case, appellant appealed a judgment entry of conviction entered by the Franklin County Court of Common Pleas. A jury convicted him of rape, kidnapping, aggravated burglary, robbery, theft, receiving stolen property, failure to comply with an order of a police officer, and possession of cocaine. In our February 12, 2008 opinion, we determined that the trial court erred by not instructing the jury that it could not consider testimony that appellant had a gun during the

commission of the offenses in determining whether he used force while committing the rape offense. *State v. Wade*, Franklin App. No. 06AP-644, 2008-Ohio-543. We noted that the evidence of force was "minimal" and there was a "substantial likelihood" that the jury considered appellant's alleged use of a gun to determine the element of force. *Id.* at fn. 7. Accordingly, we reversed the matter and remanded it for further proceedings.

The State now contends that this court committed an obvious error by reversing appellant's convictions that were not implicated by the failure to provide a limiting instruction. We agree. At trial, appellant only requested a limiting instruction for the gun testimony as it related to the element of force in the rape count. The trial court's error in not providing such an instruction did not necessarily implicate his other convictions. *State v. Barney* (May 25, 2001), Seneca App. No. 13-2000-36 (error in jury instruction for one count required reversal of that conviction; other convictions affirmed). We therefore grant the State's application to reconsider and will address appellant's remaining assignments of error.

To the extent appellant claims in his second assignment of error that the trial court erred by not providing a limiting instruction for the gun testimony as it related to other counts, we agree in part. Appellant did not request a limiting instruction for the gun testimony for any count other than the rape count. Therefore, he waived any error in the trial court's failure to provide such an instruction absent plain error.

State v. Rawls, Franklin App. No. 03AP-41, 2004-Ohio-836, at ¶ 21; *State v. Riley*, Franklin App. No. 06AP-1091, 2007-Ohio-4409, at ¶ 4; *State v. Mitchell*, Cuyahoga App. No. 88977, 2007-Ohio-6190, at ¶ 84. " 'Plain error is an obvious error * * * that affects a substantial right.' " *State v. Yarbrough*, 95 Ohio St.2d 227, 2002-Ohio-2126, at ¶ 108, quoting *State v. Keith* (1997), 79 Ohio St.3d 514, 518. An alleged error constitutes plain error only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different. *Yarbrough*, at 108. Notice of plain error is taken with the utmost caution only under exceptional circumstances and only where necessary to prevent a miscarriage of justice. *State v. Martin*, Franklin App. No. 02AP-33, 2002-Ohio-4769, at ¶ 28.

We first address appellant's kidnapping conviction. To convict appellant of kidnapping, the State had to prove beyond a reasonable doubt that appellant, by force, threat, or deception, removed the victim from a place or restrained her liberty to facilitate any felony or flight thereafter or to engage in sexual activity with the victim against her will. R.C. 2905.01.

Here, appellant forcibly pushed his way in through the front door and stood in between the victim and the front door, thereby blocking the victim's exit from the apartment. There was evidence that appellant was much taller and heavier than the victim. In light of this evidence, a reasonable jury could have concluded that even without the evidence of the gun, appellant, by force or threat, restrained the victim's liberty in order to

facilitate the commission of a felony or to engage in sexual activity with the victim. Therefore, we cannot say that the outcome of his kidnapping conviction clearly would have been different but for a limiting instruction as to the gun testimony. Cf. *State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416, at ¶ 24 (any error in admitting testimony not plain error where remaining evidence was sufficient for rational trier of fact to find defendant guilty).

We reach a different conclusion with respect to the conviction for aggravated burglary. To convict appellant of aggravated burglary in this case, the State had to prove beyond a reasonable doubt that appellant, by force, stealth, or deception, trespassed in an occupied structure when another person other than the appellant was present, with the purpose to commit any criminal offense, if the appellant inflicts, or attempts or threatens to inflict physical harm on the victim. R.C. 2911.11(A)(1).

The State contends that appellant committed this offense before he pulled out his gun by forcing his way into the apartment. Aggravated burglary does require a trespass by "force, stealth or deception." That element, however, is separate and distinct from the requirement that the State prove appellant inflicted, attempted, or threatened to inflict physical harm. At trial, the State argued that the subsequent rape satisfied the physical harm requirement. See, e.g., *State v. Shackelford* (Oct. 9, 1996), Summit App. No. C.A. No. 17690 (sexual assault inflicted physical harm for purposes of aggravated burglary). Because we have reversed appellant's rape

conviction, however, that offense cannot be used to establish the physical harm requirement for an aggravated robbery conviction.

If the jury could not consider the gun evidence for purposes of finding a threat of physical harm, there is no other evidence to establish that element of the offense. Forcible entry, by itself, is not a threat to inflict physical harm. No rationale trier of fact could have concluded beyond a reasonable doubt that appellant inflicted, attempted, or threatened to inflict physical harm based solely on a forced entry. Accordingly, the result of this conviction would clearly have been different had the trial court instructed the jury as to the proper consideration of the gun testimony.

The gun testimony does not have the same impact on his convictions for robbery, theft, receiving stolen property, failure to comply with an order of a police officer, and possession of cocaine. These counts were either admitted by appellant or committed days after the rape and kidnapping. The trial court did not commit plain error when it did not provide a limiting instruction for the gun testimony on these counts.

Appellant's second assignment of error is sustained in part and overruled in part. His convictions for rape and aggravated burglary are reversed and remanded for further proceedings. His convictions for kidnapping, robbery, theft, receiving stolen property, failure to comply with an order of a police officer, and possession of cocaine are affirmed.

Appendix A

In appellant's third assignment of error, he contends that prosecutorial misconduct deprived him of a fair trial. Specifically, appellant claims the prosecutor elicited improper testimony and made improper arguments. We disagree.

The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14-15; *State v. Thompson*, 161 Ohio App.3d 334, 341, 2005-Ohio-2508, at ¶ 30. Generally, prosecutorial misconduct is not a basis for overturning a criminal conviction, unless, on the record as a whole, the misconduct can be said to have deprived the defendant of a fair trial. *State v. Lott* (1990), 51 Ohio St.3d 160, 166. The focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. *State v. Bey* (1999), 85 Ohio St.3d 487, 495.

Appellant first argues that the prosecutor elicited improper and irrelevant testimony describing how the police obtained a DNA sample from appellant. Specifically, the lead detective in this case was allowed to testify that appellant refused to provide a DNA sample and that "99 times out of 100" defendants comply with requests for DNA samples. The detective also testified about the steps taken to obtain the sample from appellant once they obtained a search warrant, including having the SWAT team restrain appellant. Appellant claims this testimony solely was offered to inflame the jury and to suggest he refused because he was guilty.

The State claims that the evidence was properly admitted to illustrate appellant's consciousness of guilt. We agree.

" 'It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.' " *State v. Williams* (1997), 79 Ohio St.3d 1, 11, quoting *State v. Eaton* (1969), 19 Ohio St.2d 145, 160. Although no Ohio case has specifically addressed whether or not the refusal to provide a DNA sample can be used as evidence of consciousness of guilt, courts in other states have held that the refusal to provide blood samples is admissible as evidence of consciousness of guilt. See *State v. Hernandez* (2003), 117 Wash.App. 1081; *People v. Roberts* (Cal.1992), 826 P.2d 274, 310-311.

Testimony that appellant refused to provide a DNA sample was admissible as evidence of consciousness of guilt. The refusal suggests that appellant was attempting to conceal his involvement in the crime. See *Williams; State v. Barton*, Warren App. No. CA2005-03-036, 2007-Ohio-1099, at ¶ 100 (accused's use of counter measures in an attempt to defeat a polygraph examination may indicate consciousness of guilt). The testimony describing the steps taken by the police to obtain the sample from appellant was relevant to show just how far appellant would go to conceal his involvement. *Columbus v. Dials*, Franklin App. No. 04AP-1099, 2005-Ohio-6305, at ¶ 46. Appellant attempted

to blunt the impact of his refusal to provide a DNA sample by offering another reason for his refusal. The State did not engage in improper conduct by asking the detective about appellant's refusal.

Appellant also contends that the prosecutor made improper statements during closing arguments. In general, prosecutors are given considerable latitude in opening statement and closing argument. *State v. Ballew* (1996), 76 Ohio St.3d 244, 255. In closing argument, a prosecutor may freely comment on " 'what the evidence has shown and what reasonable inferences may be drawn therefrom.' " *State v. Lott* (1990), 51 Ohio St.3d 160, 165, quoting *State v. Stephens* (1970), 24 Ohio St.2d 76, 82. Appellant did not object during the prosecutor's closing argument. The failure to object to alleged prosecutorial misconduct waives all but plain error. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, at ¶ 126; *State v. Loch*, Franklin App. No. 02AP-1065, 2003-Ohio-4701, at ¶ 43.

Appellant specifically points to the prosecutor's statements in closing argument that his resistance to police efforts to obtain a DNA sample could be considered as an indicia of guilt, and that appellant only came up with his version of events after he obtained results of the DNA test. We have already determined that the refusal to provide a DNA sample and the circumstances of that refusal could be used by the State to demonstrate appellant's consciousness of guilt. Therefore, the prosecutor could properly comment on that in closing argument. Second, the prosecutor's

comment about appellant's changing version of events was a fair inference from the evidence presented at trial. When interviewed by the police on September 2, 2002, appellant denied any knowledge of an incident with the victim. Later, at his first trial and again in this trial, appellant claimed that he previously met the victim and that they had consensual sex. It was fair for the prosecutor to infer, based on the evidence at trial, that appellant altered his version of events based on information he obtained after the September 2, 2002 interview. We find no plain error in regard to these comments.

Having found no prosecutorial misconduct, we overrule appellant's third assignment of error.

Appellant contends in his fifth assignment of error that the trial court's sexual predator classification was not supported by sufficient evidence. Because we have reversed appellant's rape conviction and remanded that count for a new trial, this assignment of error is moot. App.R. 12.

Appellant's sixth, seventh, and eighth assignments of error each contend that the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, is incompatible with the United States Supreme Court precedent in this area and that he is entitled to minimum, concurrent sentences on remand. This court has previously considered and rejected this very argument. *State v. Hudson*, Franklin App. No. 06AP-335, 2007-Ohio-3227, at ¶ 23. Appellant also claims that

the *Foster* court's severance remedy, as applied to his case, violates due process and ex post facto principles against retroactivity. This court has also consistently rejected this argument. *Id.* at ¶ 25. Appellant's sixth, seventh, and eighth assignments of error are overruled.

Finally, in his fourth assignment of error, appellant contends that he received ineffective assistance of counsel at his trial. We disagree.

In order to prevail on an ineffective assistance of counsel claim, appellant must meet the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, accord *State v. Bradley* (1989), 42 Ohio St.3d 136, *certiorari denied* (1990), 497 U.S. 1011, 110 S.Ct. 3258. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's deficient conduct by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Id.* at 690.

If appellant successfully proves that counsel's assistance was ineffective, the second prong of the *Strickland* test requires appellant to prove prejudice in order to prevail. *Id.* at 692. To meet that prong, appellant must show counsel's errors were so serious

as to deprive her of a fair trial, a trial whose result is reliable. *Id.* at 687. Appellant would meet this standard with a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Appellant first claims that his trial counsel was ineffective for failing to object to the instances of prosecutorial misconduct alleged in his third assignment of error. We have already determined that the conduct complained of was not prosecutorial misconduct. Accordingly, counsel was not ineffective for failing to object to that conduct. *State v. Hairston* (June 11, 1999), Montgomery App. No. 17218.

Second, appellant contends that his trial counsel was ineffective for failing to prepare for or defend him at the sexual predator hearing. Our reversal of appellant's rape conviction renders this claim moot. App.R. 12(A).

Finally, appellant contends that his trial counsel was ineffective for failing to make objections based on assignments of error six and seven. We disagree. We have already rejected the arguments he presents in these assignments of error. The failure to raise nonmeritorius objections is not deficient performance, and additionally, appellant cannot show that he was prejudiced by counsel's failure to raise these issues.

Appellant did not receive ineffective assistance of counsel. Accordingly, his fourth assignment of error is overruled.

On reconsideration, we overrule appellant's first, third, fourth, sixth, seventh, and eighth assignments of error. His second assignment of error is overruled in part and sustained in part and his fifth assignment of error is rendered moot. Accordingly, the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part. Appellant's rape and aggravated burglary convictions are reversed and remanded for further proceedings. His other convictions are affirmed.

Application granted; judgment affirmed in part and reversed in part; and cause remanded.

BRYANT and SADLER, JJ., concurs.

APPENDIX B — OPINION OF THE COURT OF APPEALS OF OHIO FOR THE TENTH APPELLATE DISTRICT FILED FEBRUARY 12, 2008

IN THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT

No. 06AP-644
(C.P.C. No. 02CR09-5493)

(REGULAR CALENDAR)

State of Ohio,

Plaintiff-Appellee,

v.

David E. Wade,

Defendant-Appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

Defendant-appellant, David E. Wade, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas. For the following reasons, we reverse that judgment and remand the matter for further proceedings.

Appendix B

On August 20, 2002, C.B. lived in an apartment near The Ohio State University campus. Around noon on that day, C.B. returned home from work to eat lunch. As she prepared her meal, she heard a knock on the door. A man on the other side of the door asked C.B. if he could use her phone. C.B. did not recognize the man. C.B. opened the door a little and handed the man a phone. She immediately closed and locked the door. When the man was finished using the phone, C.B. opened the door to retrieve it. The man then pushed his way through the door and into her apartment. He grabbed a gun out of his backpack and told her to take off her clothes. The man then raped her. C.B. later identified appellant as the man who raped her.

After the rape, appellant asked C.B. whether she had any money. She replied that she did not. Appellant then took C.B.'s purse, her laptop computer, and a phone. He then asked for her car keys, which she gave to him. Appellant left the apartment and drove away in C.B.'s car. The entire incident lasted about 20 to 30 minutes. C.B. went to a hospital, where a physical exam revealed redness on C.B.'s cervix and additional physical findings that were consistent with her version of events.

Two weeks later, appellant was driving C.B.'s car when he was involved in a police chase. The police ultimately arrested appellant, but not before he crashed the car and ran from the police. Appellant had a bag of cocaine in his possession when he was arrested.

As a result of these events, a Franklin County Grand Jury indicted appellant with one count of rape in violation of R.C. 2907.02, one count of aggravated burglary in violation of R.C. 2911.11, one count of kidnapping in violation of R.C. 2905.01, one count of aggravated robbery in violation of R.C. 2811.01, and two counts of theft in violation of R.C. 2913.02. Each of these counts also contained firearm specifications pursuant to R.C. 2941.141 and 2941.145, alleging that appellant had a firearm during the commission of each offense. Appellant was also charged with one count of receiving stolen property in violation of R.C. 2913.51, failure to comply with an order of a police officer in violation of R.C. 2921.331, and possession of cocaine in violation of R.C. 2925.11.

Appellant entered not guilty pleas to the charges and proceeded to a jury trial. C.B. testified that appellant forced his way into her apartment and raped her at gunpoint. She also testified that he took a number of items from her apartment, as well as her car. Although appellant admitted that he stole items from C.B.'s apartment and fled from the police, he denied that he raped C .B. and denied having a gun. He testified that he had consensual sex with C.B. The jury found appellant guilty of all counts except for the aggravated robbery count. The jury also acquitted appellant of all firearm specifications in the indictment. This court reversed those convictions based upon certain procedural deficiencies and remanded the matter to the trial court. *State v. Wade*, Franklin App. No. 03AP-774, 2004-Ohio-3974.

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On remand during the second jury trial, appellant sought to prohibit the State from admitting any testimony indicating that he possessed a gun during the commission of these offenses. He argued that allowing such testimony would be inconsistent with his acquittal for aggravated robbery in the first trial because the jury in the first trial determined that he did not possess a gun during the offenses. The trial court disagreed and permitted the State to introduce evidence that appellant used a gun to commit the offenses against C.B. During the second trial, C.B. again testified that appellant forced his way into her apartment and raped her at gunpoint. She also testified that appellant stole her car and a number of other items. Appellant again admitted that he stole items from C.B.'s apartment as well as her car. He also admitted that he fled from the police and that he possessed cocaine when he was arrested. Appellant again denied, however, that he raped C.B and that he had a gun. Instead, he claimed that he met C.B. months before at a festival and that they had consensual sex that day inside her apartment.

The jury rejected appellant's defense and found him guilty of all counts.[1] The trial court designated appellant a sexual predator and sentenced him accordingly. Appellant appeals and assigns the following errors:

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1. Because the first jury acquitted appellant of aggravated robbery and determined that he did not use a gun, appellant was not tried for aggravated burglary or any of the firearm specifications in his second trial.

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ASSIGNMENT OF ERROR NO. I:

COLLATERAL ESTOPPEL BARRED THE ADMISSION OF EVIDENCE ASSERTING THAT APPELLANT POSSESSED AND BRANDISHED A GUN. THE TRIAL COURT'S FAILURE TO EXCLUDE THIS EVIDENCE DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL, DUE PROCESS, AND THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS AS WELL AS ARTICLE I, § 2, 9, 10, & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. II:

THE ADMISSION OF THE GUN EVIDENCE AS OTHER ACTS EVIDENCE VIOLATED WADE'S RIGHT TO A FAIR TRIAL AND DUE PROCESS AND VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENT. IN ADDITION, THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY ON THE PROPER LIMITATIONS OF OTHER ACTS EVIDENCE THEREBY VIOLATING WADE'S RIGHTS TO A FAIR TRIAL.

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ASSIGNMENT OF ERROR NO. III:

THE PROSECUTOR HAS AN OBLIGATION TO SEEK JUSTICE AND TO REFRAIN FROM UNFAIRLY SEEKING A CONVICTION BASED ON IMPROPER EVIDENCE, IMPROPER ARGUMENT AND OTHER MISCONDUCT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, §§ 2, 9, 10, & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. IV:

THE REPRESENTATION PROVIDED TO DAVID WADE FELL FAR BELOW THE PREVAILING NORMS FOR COUNSEL IN A CRIMINAL CASE, WAS UNREASONABLE, AND AFFECTED THE OUTCOME IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS ART. I, § 2, 9, 10, & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. V:

THE ADJUDICATION THAT DEFENDANT-APPELLANT IS A SEXUAL PREDATOR IS NOT SUPPORTED BY THE COMMON PLEAS COURT'S FINDINGS AND IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

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ASSIGNMENT OF ERROR NO. VI:

A TRIAL COURT MAY NOT SENTENCE A DEFENDANT TO NON-MINIMUM AND CONSECUTIVE SENTENCES WITHOUT VIOLATING A DEFENDANT'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 10 AND 18 OF THE OHIO CONSTITUTION. THE DECISION RENDERED BY THE SUPREME COURT OF OHIO IN *STATE V. FOSTER* (2006), 109 OHIO ST.3D 1, IS INCOMPATIBLE WITH THE CONTROLLING PRECEDENT OF THE UNITED STATES SUPREME COURT AND MUST BE REJECTED.

ASSIGNMENT OF ERROR NO. VII:

THE TRIAL COURT VIOLATED WADE'S RIGHTS UNDER THE EX POST FACTO CLAUSE OF THE FEDERAL CONSTITUTION BY SENTENCING APPELLANT TO A TERM OF INCARCERATION WHICH EXCEEDED THE MAXIMUM PENALTY AVAILABLE UNDER THE STATUTORY FRAMEWORK AT THE TIME OF THE OFFENSE. THE DECISION RENDERED BY THE

Appendix B

SUPREME COURT OF OHIO IN *STATE V. FOSTER* (2006), 109 OHIO ST.3D 1, WHICH PURPORTS TO AUTHORIZE THE SENTENCE RENDERED AGAINST DAVID WADE, IS INCOMPATIBLE WITH THE CONTROLLING PRECEDENT OF THE UNITED STATES SUPREME COURT AND MUST BE REJECTED.

ASSIGNMENT OF ERROR NO. VIII:

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION BY SENTENCING APPELLANT PURSUANT TO THE DECISION RENDERED BY THE SUPREME COURT OF OHIO IN *STATE V. FOSTER* (2006), 109 OHIO ST.3D 1, BECAUSE THE HOLDING OF *FOSTER* IS INVALID UNDER *ROGERS V. TENNESSEE* (2001), 532 U.S. 451.

In his first and second assignments of error, appellant contends that the trial court erred by admitting testimony indicating that he used a gun during the commission of the rape when the jury in his first trial necessarily found that he did not possess a gun. Appellant also contends that the trial court erred by not giving a limiting instruction to the jury after the trial court admitted testimony that appellant raped C.B. at gunpoint.

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The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution incorporates the doctrine of collateral estoppel. *Ashe v. Swenson* (1970), 397 U.S. 436, 445-446, 90 S.Ct. 1189.[2] Simply put, collateral estoppel means that when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated again between the same parties in any future lawsuit. *Id.* at 443; *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 442.

Collateral estoppel may affect successive prosecutions in one of two ways. *United States v. Brackett* (C.A.5, 1997), 113 F.3d 1396, 1398. First, it will completely bar a subsequent prosecution if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution. For example, in *Ashe,* a defendant charged with the robbery of six people at a poker party was found not guilty of one of the robberies. The only contested issue at trial was whether Ashe was one of the robbers. The jury concluded that he was not. The state subsequently tried Ashe for the robbery of another person at the poker party. The United States Supreme Court held that because the jury in the first trial necessarily found that Ashe was not one of the robbers, the state could not prosecute him again, because a second prosecution would require the relitigation of that issue. *Id.* at 446; see, also, *Columbus v. Rodriquez* (Nov. 7, 1996), Franklin

2. The Fifth Amendment's Double Jeopardy protections are enforceable against the States through the Fourteenth Amendment. *Ashe,* at 437.

App. No. 96APC05-601 (noting that collateral estoppel may bar second prosecution).

Secondly, collateral estoppel can also bar certain evidence in a subsequent trial. The doctrine prohibits the government from relitigating an issue of ultimate fact that was determined by a valid and final judgment. *Dowling v. United States* (1990), 493 U.S. 342, 347, 110 S.Ct. 668. This prohibition, however, does not exclude, in all circumstances, relevant and probative evidence otherwise admissible simply because it relates to alleged criminal conduct for which a defendant has been acquitted. *Id.* at 348.

Evidence of alleged criminal conduct for which a defendant has been acquitted may be admitted in a second trial where the ultimate issue of fact decided in defendant's favor in the first trial is not an ultimate issue of fact in the second trial. *Wright v. Whitley* (C.A.5, 1994), 11 F.3d 542, 546; *Brackett,* supra; *United States v. Bailin* (C.A.7, 1992), 977 F.2d 270, 280 (preclusion applied only where issue is ultimate issue in subsequent prosecution); *State v. Cotton* (La.2001), 778 So.2d 569, 576 (no preclusion where prior acquitted conduct not ultimate issue in second trial); *Eatherton v. State* (Wyo.1991), 810 P.2d 93, 100 (evidence of theft charge for which defendant was acquitted properly admitted in subsequent burglary trial where previous acquittal did not determine ultimate issue in burglary trial).

For example, in *Santamaria v. Horsley* (C.A.9, 1998), 133 F.3d 1242, the defendant was charged with murder

and robbery as well as a weapon enhancement which alleged that he used a knife in the commission of a felony. He was found guilty of murder and robbery but acquitted of the weapon enhancement. After an appeals court reversed those convictions, on remand the defendant sought to prohibit the prosecution from retrying him on the theory that he used a knife during the murder. The trial court agreed and prohibited the state from proceeding on that theory. After the California Supreme Court reversed, the United States Ninth District Court of Appeals, on a petition for a writ of habeas corpus, held in part that because the State was not required to prove beyond a reasonable doubt that the defendant used a knife in order to convict the defendant of murder in the second trial, the use of a knife was not an ultimate fact in the second trial. Thus, the state could present evidence that the defendant stabbed the victim. *Id.* at 1247.

Similarly, an issue may be relitigated in a second trial where the later action is governed by a lesser standard of proof. *Dowling.* For example, evidence of a prior bad act for which a defendant was acquitted may be introduced at a second trial under Evid.R. 404(B) to prove, among other things, identity. Such evidence is admissible because the State is not trying the defendant for the bad act in the second trial. *Id.* (evidence that defendant later committed home invasion, even though he was acquitted of the robbery, could be introduced at a later trial for earlier bank robbery to prove identity); *Charles v. Hickman* (C.A.9, 2000), 228 F.3d 981, 986 (testimony regarding previously acquitted charge of

murder properly admitted to prove motive in subsequent trial); *In re Burton*, 160 Ohio App.3d 750, 2005-Ohio-2210, at ¶ 14.

The case at bar does not involve the successive prosecution theory of collateral estoppel. At his second trial, appellant was not tried for aggravated robbery or any gun specifications. Here, the issue is whether or not collateral estoppel prohibited the admission of testimony in his second trial that appellant possessed a gun. We review the trial court's application of collateral estoppel de novo. *Charles*, at 985; *Bailin*, at 281 (de novo review of collateral estoppel decision) cf. *United States v. Dakota* (C.A.6, 2000), 197 F.3d 821, 826 (claims of double jeopardy reviewed de novo).

To determine whether collateral estoppel bars the admission of evidence that appellant used a gun during the commission of these offenses, we must first determine whether the jury in the first trial necessarily found that appellant did not possess a gun. Thus, we must examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matters, and decide whether the jury could have reached its verdict without finding that appellant did not possess a gun. *Id.; Bailin*, at 280 (court must decide whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration). The defendant bears the burden to prove that the issue was necessarily resolved by the prior jury. *Dowling*, at 350.

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The State contends that the not guilty verdict in the first trial for the aggravated robbery count as well as the firearm specifications did not actually determine that appellant did not use a gun, because the jury could have acquitted appellant for other reasons. We disagree. The elements of aggravated robbery require that appellant attempt or commit a theft offense while possessing a deadly weapon. R.C. 2911.01. Appellant admitted to stealing C.B.'s car, computer, purse, and phone. Thus, the only conceivable reason for the jury's acquittal on this count was a finding that appellant did not possess a gun during the theft. Additionally, the jury asked during its deliberations whether appellant must have had a deadly weapon to find him guilty of aggravated robbery. The trial court replied in the affirmative. The jury then acquitted appellant of aggravated robbery and all of the firearm specifications. It is clear that the first jury actually decided that appellant did not possess a gun during the offenses and it is not conceivable that a rational jury could have grounded its verdict on any other issue.[3] *Ashe,* at 444.

Next, we must determine whether the issue necessarily decided in the first trial (that appellant did

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3. The State argues that the first jury may have acquitted appellant because the gun was not operable. We reject that claim based on the jury's own question as well as the fact that no evidence or argument was presented in the first trial on this issue. In order to determine what issue was actually litigated in the first trial, we do not apply the rule of collateral estoppel with a "hypertechnical and archaic approach" but with "realism and rationality." *Ashe,* at 444.

not have a gun) is an ultimate issue in the subsequent trial. To find appellant guilty of rape or kidnapping, the State had to prove beyond a reasonable doubt that appellant forcibly engaged in sexual conduct with C.B. and restrained her liberty using force. See R.C. 2907.02 and 2905.01. Force is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). The definition of force does not require the use of a weapon. Therefore, the State could prove these offenses without proving that appellant used a gun.

Admittedly, testimony indicating appellant had a gun could be used to prove the force element of both rape and kidnapping. However, the jury's general verdict of guilty does not provide insight as to what facts the jury believed in this trial to find appellant guilty of rape and kidnapping. There are other ways to establish the element of force for these offenses. Here, there was evidence that C.B. was less than five feet tall and that appellant was six feet tall, weighed 170 pounds and that he forced his way into her apartment. We also note that although the first jury determined that appellant did not have a gun, it nevertheless found appellant guilty of rape and kidnapping, thereby finding the element of force beyond a reasonable doubt even without a gun. Thus, the State was not precluded from admitting evidence that appellant possessed a gun during the

offenses, provided that the testimony was otherwise admissible. *Dowling,* at 348.[4]

We further find that the testimony that appellant possessed a gun during these offenses was admissible. Evidence of appellant's actions during the offenses is admissible if the evidence is "inextricably related" to the crime charged and plays a role in explaining the sequence of events and gives a complete picture of the alleged crime. *State v. Thompson* (1981), 66 Ohio St.2d 496, 498; *State v. Henry,* Franklin App. No. 05AP-1075, 2006-Ohio-4783, at ¶ 27. Testimony that appellant possessed a gun during the offenses is inextricably related to the charges and provides a complete picture of the sequence of events. See *State v. Jackson,* Franklin App. No. 02AP-867, 2003-Ohio-6183, at ¶ 31. The jury was entitled to a complete picture of the alleged crimes. The trial court did not err by admitting testimony indicating that appellant possessed a gun during these offenses.[5]

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4. Appellant's reliance on *Rice v. Marshall* (C.A.6, 1987), 816 F.2d 1126 is misplaced. First, we note that the case dealt with an ineffective assistance of counsel claim. Secondly, although the court did note, relying on *Ashe,* supra, that a previous acquittal of a weapon charge constituted a finding that he did not have a gun and precluded the introduction of contrary evidence at a subsequent trial, that case was decided before *Dowling* clarified the scope of the *Ashe* holding.

5. We do not agree with the trial court that evidence that appellant used a gun during these offenses was properly

(Cont'd)

Finally, appellant contends that the trial court erred by not giving the jury a limiting instruction regarding the gun testimony. Appellant did not request that the trial court instruct the jury that he had previously been acquitted of possessing a gun during the commission of the offenses. Instead, he requested that the trial court instruct the jury that it could not consider the gun testimony to determine whether he used force in the rape. The trial court denied appellant's request. It is well-established that a trial court has broad discretion in instructing the jury. *State v. Simpson*, Franklin App. No. 01AP-757, 2002-Ohio-3717, at ¶ 84, citing *State v. Smith* (Apr. 2, 2002), Franklin App. No. 01AP-848.

Collateral estoppel did not bar the admission of testimony indicating appellant had a gun during the commission of the offenses. Further, that testimony was admissible to provide the jury a full and complete picture of the sequence of events the victim described. However, the State did not present the testimony simply to provide the jury with a complete picture of the events. During the State's questioning of C.B., the prosecutor referred to appellant's possession of a gun during the rape a number of times, implying that appellant used the gun to commit the rape. In closing arguments, the prosecutor referred to the rape charge and reminded

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(Cont'd)

admitted as "other acts" evidence under Evid.R. 404(B) because the evidence was not admitted to prove any of the permissible purposes under that rule. Nevertheless, for the reasons discussed, the evidence was admissible on other grounds.

the jury that "the Defendant had a weapon while committing that offense." It is clear that the State used the gun testimony to prove that appellant used force to commit the rape.[6]

Although collateral estoppel did not prohibit the admission of testimony indicating that appellant possessed a gun, the principle underlying that doctrine requires a limiting instruction such as the one appellant requested. Cf. *Rossetti v. Curran* (D.Mass.1995), 891 F.Supp 36, 47 (noting concerns underlying doctrine). The principle is that one who has been acquitted of a crime should not be forced to "run the gauntlet" a second time. *Ashe,* at 446. Cf. *Rossetti,* quoting *Dowling* ("If there ever was the likelihood that such evidence would create the 'constitutionally unacceptable risk that the jury will convict . . . on the basis of inferences drawn from the acquitted conduct,' it is this case."). The danger of this occurring in this case was high.

Absent a limiting instruction, there was a significant danger that the jury in the second trial would find the element of force for rape based upon evidence that the appellant had a gun, even though the jury in the first trial necessarily found that appellant did not possess a gun during the offenses. Appellant's requested limiting instruction would have allowed C.B. to describe her version of the events but would have prevented the jury

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6. The prosecutor also told the jury, in regards to the kidnapping charge, that C.B. would have left the apartment but for the fact that appellant had a gun.

from using the evidence that appellant had a gun to find the element of force for a rape conviction. The trial court abused its discretion by not instructing the jury that it could not consider the gun testimony in determining whether appellant used force while committing the rape offense.[7]

Appellant's first assignment of error is overruled. However, because the trial court erred by not providing the limiting instruction requested by appellant, we sustain in part appellant's second assignment of error. Our resolution of appellant's second assignment of error renders appellant's remaining assignments of error moot. App.R. 12(A). This matter is remanded to the Franklin County Court of Common Pleas for further proceedings consistent with law and this opinion.

Judgment reversed and cause remanded.

BRYANT and SADLER, JJ., concur.

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7. Although we have previously referred to evidence other than the gun testimony that could support a finding of force in this case, that evidence was minimal. There is a substantial likelihood that the jury considered appellant's alleged use of a gun in finding the element of force. Thus, we cannot say that the trial court's error was harmless. See *State v. Ganelli*, Cuyahoga App. No. 84694, 2005-Ohio-770, at ¶ 28.

APPENDIX C — ENTRY DENYING REVIEW OF THE SUPREME COURT OF OHIO FILED AUGUST 6, 2008 (Case No. 2008-0604)

THE SUPREME COURT OF OHIO

Case No. 2008-0604

ENTRY

State of Ohio

v.

David E. Wade

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

Upon consideration of appellant's motion to consolidate this case with Supreme Court Case No. 2008-0941,

It is ordered by the Court that the motion is denied as moot.

(Franklin County Court of Appeals; No. 06AP644)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX D — ENTRY DENYING REVIEW OF THE SUPREME COURT OF OHIO FILED AUGUST 6, 2008 (Case No. 2008-0941)

THE SUPREME COURT OF OHIO

Case No. 2008-0941

ENTRY

State of Ohio

v.

David E. Wade

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and leave to cross-appeal and dismisses the appeal and the cross-appeal as not involving any substantial constitutional question.

Upon consideration of appellant/cross-appellee's motion to consolidate this case with Supreme Court Case No. 2008-0604,

It is ordered by the Court that the motion is denied as moot.

(Franklin County Court of Appeals; No. 06AP644)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Case No. 08-585

IN THE SUPREME COURT
OF THE UNITED STATES

STATE OF OHIO,
Petitioner,

vs.

DAVID E. WADE.
Respondent.

On Petition for Writ of Certiorari to the
Ohio Court of Appeals for the Tenth District

Brief of Respondent in Opposition to Petition for Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE DOCTRINE OF COLLATERAL ESTOPPEL LIMIT OR BAR THE STATE FROM INTRODUCING EVIDENCE OF ACQUITTED CONDUCT AT SUBSEQUENT TRIAL?

II. DOES THE STATE BEAR THE BURDEN OF DEMONSTRATING THAT THE ACQUITTAL AT THE PREVIOUS TRIAL WAS DEPENDENT ON A FACTOR OTHER THAN THAT THE JURY FOUND THAT THE DEFENDANT DID NOT POSSESS A FIREARM DURING THE INCIDENT IN QUESTION?

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Fifth Amendment ..... passim

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STATEMENT OF THE CASE AND FACTS

This case involves the second trial of David Wade who was originally charged with eight offenses including rape, kidnapping, theft, and aggravated burglary. Each offense carried a specification that the offense was committed while Wade possessed a firearm. In the first trial, the jury found Wade not guilty of all of the firearm specifications and the one count of aggravated robbery alleging that he had committed the robbery while possessing a firearm. The jury found Wade guilty of all additional offenses. On his first appeal, the remaining convictions were reversed on unrelated issues.

At his re-trial Wade moved to limit the state's introduction of any evidence demonstrating that he possessed a gun during this incident because he had been acquitted of possessing a gun during the incident at the first trial. The trial court considered the law of collateral estoppel, but overruled Wade's motion and permitted the state to introduce evidence that he possessed a gun during this incident - despite the earlier acquittal. The trial court, likewise, refused to give the jury a limiting instruction on the jury's use of this evidence despite Wade's request. Wade was again convicted of the remaining counts.

On his appeal of this second set of convictions, the Court of Appeals analyzed the law on collateral estoppel before concluding that the trial court

properly admitted the gun evidence. The Court of Appeals further concluded that the trial court should have given the limiting instruction on the use of this evidence requested by Wade, The Ohio Court of Appeals reversed Wade's convictions on all counts.

The Court of Appeals applied clear precedent requiring a limiting instruction in this situation where Wade had been acquitted of possessing a firearm during an earlier trial on the same incident. See, *Dowling v. United States*, 493 U.S. 342, 347 (1990) ("Especially *in light of the limiting instruction provided by the trial judge,* we cannot find introduction of [evidence of the prior acquitted conduct erroneous.]" *Id* at 353.)

Critically, the Court of Appeals reached its holding based on a unique factual scenario that is highly unlikely to reoccur and that carries no great federal constitutional import. The facts here more likely resemble a law school exam question than an issue that requires the intervention of this Court. This case concerns a retrial of charges arising out of one incident where Wade had been acquitted of possessing a firearm during the incident at the first trial. The State of Ohio recognized that Wade could not be retried on the acquitted charges, but nevertheless insisted on presenting evidence that he had possessed a firearm during the incident at the second trial. Now, the state

speculates that the original jury may have only concluded that the weapon was not operable, so that evidence that he had the gun was admissible. The operability of the firearm has never been an issue at either trial. The trial court at the second trial *permitted* the introduction of evidence that Wade possessed a firearm during the incident and refused to give a limiting instruction.

The Court of Appeals in the second appeal, after a lengthy discussion of the doctrine of collateral estoppel, found no error in the trial court's admission of the gun evidence but found that a limiting instruction was required.[1]

REASONS FOR DENYING THE WRIT

I COLLATERAL ESTOPPEL LIMITS OR BARS THE STATE FROM INTRODUCING EVIDENCE OF ACQUITTED CONDUCT AT SUBSEQUENT TRIAL. 5th and 14th AMENDMENTS.

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[1] The Court of Appeals released a second decision granting the State of Ohio's Application for Reconsideration ordering a new trial only on the counts of rape and aggravated burglary but upholding the conviction and sentences on the other counts. The Court of Appeals concluded that Wade had only requested a limiting instruction on those charges.

II. THE STATE BEARS THE BURDEN TO DEMONSTRATING THAT EVIDENCE OF ACQUITTED CONDUCT IS ADMISSIBLE AT A SUBSEQUENT TRIAL. 5th and 14th AMENDMENTS.

Petitioner State of Ohio bases its argument on the proposition that the doctrine of collateral estoppel never bars the admission of evidence. The State of Ohio further appears to argue that in order for the doctrine of collateral estoppel to bar introduction of such evidence in subsequent trial, the defendant bears the impossible burden of proving that the acquitted conduct was necessarily decided in his favor at the previous trial. The state's premise is clearly erroneous and ignores the convoluted facts of this case as well as this Court's precedent on double jeopardy and collateral estoppel.

Stated most simply, collateral estoppel under the 5th and 14 Amendments is "the principle that bars relitigation between the same parties of issues actually determined at a previous trial...." *Ashe v. Swenson,* 397 U.S. 436, 442 (1970). It "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443; *Schiro v. Farley*, 510 U.S. 222, 232 (1994); *Dowling v. United States*, 493 U.S. 342, at 347 (1990).

Thus, the collateral estoppel doctrine prohibits the Government from

relitigating an issue of ultimate fact that has been previously determined by a valid and final judgment. Collateral estoppel can result either in prohibiting the introduction of particular evidence in a subsequent trial, see *Rice v. Marshall*, 816 F.2d 1126 (6th Cir. 1987) or in precluding a subsequent prosecution. *Ashe v. Swenson*, *supra*; *United States v. Frazier*, 880 F.2d 878 (6th Cir. 1989). As recognized by the Ohio Court of Appeals, the doctrine does not necessarily bar the use of evidence in all circumstances simply because it relates to alleged criminal conduct for which a defendant has been acquitted. *Dowling v. United States*, 493 U.S. at 350.

However, the Ohio Court of Appeals concluded here that the prior acquittal on all of the charged firearm specifications and the aggravated robbery charge arising out of the same incident *necessarily* arose out of a jury finding that the state had not proven that Wade had a gun in his possession during this incident. The Court of Appeals based its decision in part on the fact that the jury had been instructed it must find that Wade *possessed* a deadly weapon to find the defendant guilty of aggravated robbery. Given that instruction, the Ohio Court of Appeals concluded that the original jury acquitted Wade of all charges and specifications that required a finding the he *possessed* a gun. There is no clear and convincing evidence in the record to

demonstrate that the jury concluded otherwise.

Nevertheless, the State of Ohio now *speculates* that the jury *may have* instead found that the State of Ohio had not proven that the gun was operable rather than that the state had not proven that Wade *possessed* a gun. The operability of the firearm was never an issue at the first trial or anytime thereafter. Based on this unsupported speculation (contrary to the conclusions of the Court of Appeals), the State of Ohio continues to argue that because the jury *could have concluded* that the gun was inoperable that it was free to introduce evidence that Wade *possessed* a gun and that he used the gun to threaten the victim. ("In the absence of evidence that the respondent actually fired the weapon or that the weapon was recovered and tested, the first jury rationally could have concluded that the respondent in fact had possessed a gun but that there was a doubt about the "deadly" and "operable" nature of the gun." Petition at 22) The state further argues that because the jury could have concluded that the firearm was inoperable in the first trial, no limitations should have been placed on the jury's consideration of this evidence once it was introduced at the second trial.

The state's argument is purely speculative and is contrary to the evidence. The state's argument was properly rejected by the Ohio Court of

Appeals.

At the first trial, the jury submitted a question about the necessity of finding that Wade *possessed* a gun in order to find Wade guilty of aggravated robbery. The question was answered in the affirmative. This jury question and the trial court's response - as well as the fact that there was no evidence or argument regarding the non-operability of the firearm during the first trial - conclusively demonstrates that the original jury found that Wade did not possess a gun during the incident. The Ohio Court of Appeals' conclusion that the first jury necessarily found that the state had not proven beyond a reasonable doubt that Wade possessed a gun during this incident is supported by the record. The State of Ohio has presented no evidence demonstrating that this conclusion is incorrect. The State of Ohio's argument is based on pure speculation.

Thus the conclusions of the Ohio courts that if this evidence was admissible at the second trial at all, a limiting instruction was required, is not of substatantial constitutional significance requiring the intervention of this Court. Further, Petitioner State of Ohio's argument – based as it is on speculation about what the original jury concluded – demonstrates the unique nature of the issue here and demonstrates that it is not a subject worthy of this Court's

review.[2]

The Court of Appeals concluded that the evidence that Wade used a gun to intimidate the victim was admissible in the second trial because it did not involve an ultimate fact that had previously determined and because it was inextricably related to other evidence that Wade had committed these offenses. The state thus had a right to present that evidence. Nevertheless, the Court of Appeals properly recognized that the evidence that Wade possessed a gun may have been mistakenly used by the jury to determine the element of force in the rape count because the trial court had failed to give a proper limiting instruction. The Court of Appeals further found on reconsideration that because the rape charge was the basis for the aggravated burglary charge, a limiting instruction was required on that charge also.

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At the second trial, in arguing the admissibility of this evidence, the state conceded that the record from the first trial clearly indicated that the jury concluded that Wade did not possess a gun: ". . . the jury left clear footprints as to the fact that they did in fact consider whether or not the defendant had a gun and they decided that he was not guilty of that, and I think that is pretty clear . . ." Transcript March 13, 2007 at 21-22.

Respondent State of Ohio nevertheless erroneously argues that the Court of Appeals relied solely on a disapproved decision, *Rosetti v. Curran*, 891 F.Supp. 36, (D. Mass., 1995). In fact, the Court of Appeals cited *Rosetti*, but relied on *Ashe v. Swenson*, the leading case from this Court. See, Opinion at 13.

The Court of Appeals followed the very procedure approved by this Court in *Dowling v. United States*, 493 U.S. 342 (1990). In *Dowling*, the trial court instructed the jury that the defendant had been acquitted of the conduct, emphasized the limited purpose for which evidence of the acquitted conduct was admitted and reiterated that limitation in the final charge. *Dowling*, 493 U.S. at 346. This Court relied on the limiting instruction as a reason for permitting the introduction of evidence of the prior acquitted conduct: "[e]specially in light of the limiting instruction provided by the trial judge, we cannot find introduction of [evidence of the prior acquitted erroneous.]" *Dowling* at 353.

The Court of Appeals recognized and applied the law on collateral estoppel permitting the evidence of gun possession to be admitted but requiring its use by the jury to be limited with a proper instruction. The decision is consistent with this Court's precedent. The state has failed to

demonstrate any reason for this Court to review the decision of the Court of Appeals.

CONCLUSION

The Petitioner State of Ohio has presented no issue of major constitutional substance and no issue that is in conflict throughout the country. The requirement of a proper limiting instruction when evidence of acquitted conduct is introduced in a subsequent trial is clearly set forth in numerous cases. Moreover, this is a uniquely fact-intensive issue which only affects the parties in a twice reversed case.

This Court should deny the State of Ohio's Petition for Certiorari.

Respectfully submitted,

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